KWONG YIK BANK BHD. v. HAH CHIEW YIN YIN

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah F.JJ.) October 29 & 30, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 131 of 1984]

Bankruptcy – Application to have adjudication order annulled – Debts of bankrupt not paid in full – Bankruptcy Act, 1967, s. 105(1).

In this case the appellant had obtained judgment in 1976 against the respondent in the sum of $30,000.00. Subsequently a sum of $15,000.00 was paid towards reduction of the judgment debt and by 1981 the balance still due and owing plus accumulated interest was $30,000.00 or thereabout. In 1981 the appellant caused a bankruptcy notice to be issued against the respondent and Receiving and Adjudication Orders were made. Subsequently the respondent's husband approached the appellant with a view to a settlement to enable the respondent to apply to the Court to have the adjudication order annulled. Sums totalling $16,000 were paid to the appellant and the respondent thereupon filed a motion to have the adjudication order annulled on the ground that the debts of the bankrupt had been paid in full. The learned trial judge found on the documentary evidence that the appellant had agreed to accept and had accepted $16,000-00 in full settlement and there was no merit in the objection of the appellant who opposed the motion. He therefore granted an order in terms of the notice of motion. The appellant appealed.

Held, in this case, the respondent (bankrupt) had failed to satisfy that the proved debt lawfully due to the appellant had been paid in full in cash and therefore the order of the learned Judge in annulling the adjudication order must be set aside.

Cases referred to :

(1) *In re Keet* [1905] 2 K.B 666, 676.
(2) *More* v. *More* [1962] 1 All E.R. 125.
(3) *In re Hester* (1889)22 Q.B.D. 632.

FEDERAL COURT.

S. Achan for the appellant.
Atma Singh Veriah for the respondent.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): We allowed the appeal and here are our reasons for doing so.

The facts do not appear to be in dispute and may be shortly stated. On September 10, 1976 Kwong Yik Bank Berhad (hereinafter referred to as the appellant) obtained judgment against Hah Chiew Yin (the bankrupt) in the sum of $30,000.00 together with interest and costs. In 1979 a sum of $15,000.00 was paid towards reduction of the judgment-debt and by 1981 the balance still due and owing plus accumulated interest was $30,000.00 or thereabout. In October 1981 the appellant caused a Bankruptcy Notice to be issued against the bankrupt and this was followed by the Creditor's Petition. On July 5, 1982 both Receiving and Adjudication Orders were made against the bankrupt. The Statement of Affairs filed by the bankrupt showed that there was only one creditor, *viz.* the appellant. The bankrupt's husband then approached the appellant with a view to effect a settlement in order to enable the bankrupt to apply to the Court to have the adjudication order annulled. With the money provided by the bankrupt's brother-in-law a sum of $6,000.00 was paid to the appellant on August 28, 1982 and another sum of $10,000.00 was paid on November 2, 1982. On receipt of the second payment of $10,000.00 the appellant wrote a letter to the Office Assignee.

On January 27, 1983 the bankrupt filed a notice of motion under section 105(1) of the Bankruptcy Act 1967 to have the adjudication order annulled on the ground that the debts of the bankrupt had been paid in full. The Official Assignee made a report to the Court stating that the appellant had notified him by letter dated November 2, 1982 that its claim against the bankrupt had been settled by the bankrupt's husband. At the hearing of the motion it was the contention of the bankrupt that the appellant had agreed to receive the sum of $16,000.00 in full and final settlement of its claim against the bankrupt. The learned Judge found on the documentary evidence that the appellant "had agreed to accept and had accepted $16,000.00 in full settlement" and that there was no merit in the objection of the appellant in opposing the motion. He therefore granted an order in terms of the notice of motion.

Before us learned Counsel for the appellant had submitted that the learned Judge erred in law and in fact in holding that the bankrupt had satisfied the second limb of section 105(1) of the Bankruptcy Act 1967.

The relevant part of the second limb reads "where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full ... the court may annul the adjudication".

It is pertinent to observe that the bankrupt was not applying for an order of discharge but was applying for an order annulling her adjudication. The effect of this is to wipe out the bankruptcy

altogether and put the bankrupt in the same position as if there had been no adjudication order (*per* Stirling L.J. in *In re Keet*[1]).

It is common ground that our Bankruptcy Act 1967 is modelled along the English Bankruptcy Act 1914 and the phrase in the second limb of section 105(1) of our Act is in identical terms with the words in the second limb of section 29(1) of the Act 1914. The meaning of these words "where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full" was considered by the English Court of Appeal in the case of *In re Keet.* Although the decision was based on section 35 of the English Bankruptcy Act 1883 it is not disputed that the section corresponded to section 29(1) of the 1914 Act. In *re Keet (supra)* it was held that to satisfy the section the "debts" – including at least all debts which have been actually and properly proved in the bankruptcy – must have been fully paid in cash, and that the second limb is not satisfied by an unconditional release given to the bankrupt by his creditors. *Keet's case* was followed some fifty-seven years later by Cross J. in *More* v. *More.*[2] We have no doubt as to the soundness of this interpretation. In construing the provisions of the Bankruptcy Act 1967 it has to be borne in mind the observations of Fry L.J. in *In re Hester*[3] at page 641:

"I conceive that one of the objects of this statute was, if not to put an end to, yet at least to discourage, private arrangements between a debtor and his creditors. Anyone who knows the history of the law of debtor and creditor of this country, knows that private arrangements between debtors and their creditors have often been scandalous, and that they have given opportunities for misrepresentation, for private bargains, and for undue preferences. I for one should pause long before I allowed the evils of private arrangements between a debtor and his creditors to creep into the administration of this Act ..."

We would adopt every word which has fallen from the lips of the learned Lord Justice.

It appears to us that the case of *In re Keet* (*supra*) and *More* v. *More* (*supra*) had not been cited to the Court below and if the attention of the learned Judge had been drawn to these two authorities he might not have exercised the discretion and made an Order as prayed. On the affidavit evidence adduced before the learned Judge, in our opinion, the bankrupt had failed to satisfy that the proved debt lawfully due to the appellant had been paid in full in cash. For these reasons we allow the appeal of the appellant and set aside the order of the learned Judge in annulling the adjudication order. The appellant is clearly entitled to its costs here and in the Court below. The deposit to be refunded to the appellant.

Appeal allowed.

Solicitors : *Nik Hussain, Ibrahim & Abdullah, Atma Singh Veriah & Co.*

PUBLIC PROSECUTOR v. BALDEV SINGH

[A.Cr.J. (Zakaria Yatim J.) February 27, 1985]

[Penang – Criminal Appeal No 3 of 1984]

Criminal Law and Procedure – Charges of cheating and criminal breach of trust – Acquittal on first charge without calling on defence – Acquittal after hearing defence on second charge – Appeal – Burden on prosecution and on defence.

In this case the respondent, an advocate and solicitor, was charged with two charges alleging (a) that he cheated an insurance company by dishonestly inducing them to pay him $3,500 in respect of an accident claim made by one Mohamad Salleh by falsely representing that Mohamad Salleh was alive when the respondent knew that he was already dead; (b) that the respondent being an agent of the said Mohamad Salleh and entrusted with a sum of $3,500 committed criminal breach of trust in respect of part of the money. At the close of the case for the prosecution, the learned President of the Sessions Court found, in respect of the first charge, that the prosecution had failed to make out a *prima facie* case against the respondent, who was accordingly acquitted and discharged. With regard to the second charge, the learned President called on the respondent to enter on his defence. After hearing the respondent's evidence on oath and the evidence of his witness, the learned President was satisfied with the defence explanation. He found the respondent not guilty of the charge and acquitted and discharged him. The Public Prosecutor appealed.

Held: (1) what the trial court has to decide at the end of the prosecution case is a question of law only. But in arriving at a conclusion the trial court has to examine the evidence before it. If the evidence is inherently incredible or if the prosecution has failed to prove one or more of the ingredients of the charge the trial court is justified in not calling upon the accused to enter on his defence;

(2) in this case the learned President found that the evidence adduced by the prosecution on the first charge was inherently incredible and he found that the ingredients of the charge had not been proved. He was therefore fully justified in acquitting the respondent in respect of the first charge without calling his defence;

(3) in regard to the second charge the learned President was satisfied with the defence explanation. The learned President had evaluated the evidence of the defence carefully and there was no misdirection in this case. The learned President had come to the right decision in accepting the defence explanation and acquitting the respondent.